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In the Supreme Court of the United States

OCTOBER TERM, 1988

OEN YIN-CHOY, PETITIONER

v.

GLEN S. ROBINSON, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's extradition to Hong Kong violates the terms of the extradition treaty between the United States and the United Kingdom.

2. Whether the extradition court erred in denying petitioner's request for the production of prior statements by several witnesses whose affidavits were admitted at the extradition hearing.

3. Whether the extradition court abused its discretion in denying petitioner's request to question the Hong Kong case agent, who was present but did not testify at the extradition hearing.

4. Whether the extradition court properly admitted evidence that satisfied the requirements of 18 U.S.C. 3190 and the applicable extradition treaty.

5. Whether the district judge was required to recuse himself from presiding over petitioner's habeas corpus proceeding because he had presided over petitioner's extradition hearing.

6. Whether the extradition court properly excluded evidence offered by petitioner on the ground that the evidence was offered to contradict, rather than explain, the evidence offered by the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-22) is reported at 858 F.2d 1400. The certificate of extraditability entered by the district court (Pet. App. 39-40, 51-52) and the order denying the petition for a writ of habeas corpus (Pet. App. 53-54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1988. A petition for rehearing was denied on December 7, 1988. The petition for a writ of certiorari was filed on March 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Extradition to the Crown Colony of Hong Kong is governed by an extradition treaty between the United States, United Kingdom ~~and Northern Ireland~~, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468 (Treaty), and a 1986 supplementary treaty (132 Cong. Rec. S9120 (daily ed. July 16, 1986)) (Supplementary Extradition Treaty). See Pet. App. 1-6. The Treaty obligates the United States to extradite fugitives to the United Kingdom, including the Crown Colony of Hong Kong, when the request for extradition is supported by a sufficient showing and there is no basis under the Treaty to deny the extradition. Attached to the Treaty is a list of extraditable offenses, those offenses include the crimes of "theft, larceny, embezzlement," "obtaining property, money or valuable securities by false pretenses or other form of deception," "false accounting," and "fraud or false statements by company directors and other officers."

Article XII of the Treaty sets forth the "rule of speciality," which limits the requesting State's right to proceed against the fugitive "for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted." Article XII also limits the requesting State's ability to extradite the fugitive to a third State without the consent of the sending State.

2. During the 19th century, Great Britain concluded three treaties with the Imperial Government of China under which most of the territory comprising Hong Kong was leased to Great Britain for 99 years, and the remainder was ceded to Great Britain in perpetuity. On December 19, 1984, the United Kingdom and the People's Republic of China signed the Joint Declaration on the Question of Hong Kong, which provides that the People's Republic of China will resume the exercise of sovereignty over Hong Kong on July 1, 1997. Pet. App. 12.

3. On February 20, 1987, the Hong Kong Magistrate's Court issued a warrant of arrest charging petitioner with false accounting and publishing a false statement. Two weeks later, the United States District Court for the Central District of California issued a provisional arrest warrant against petitioner, on a complaint filed at the request of the Embassy of the United Kingdom. On April 15, 1987, the United States filed a formal request to extradite petitioner to Hong Kong.

The Hong Kong arrest warrant alleged in six counts that while serving as chairman of the Union Bank of Hong Kong, petitioner embezzled a total of approximately $26,750,000 through false accounting practices. According to the arrest warrant, petitioner's acts constituted the crime of "false accounting" under the laws of Hong Kong. A seventh count alleged that petitioner entered false information in the bank's annual report, conduct that was said to constitute the crime of making a false statement under Hong Kong law.

The evidence at the extradition hearing, which is recounted in detail in the government's brief in the court of appeals (Gov't C.A. Br. 6-19), consisted principally of bank documents (some signed by petitioner), affidavits, the affidavit of an accountant affiliated with the firm of Ernst & Whinney and hired by the Government of Hong Kong, and the accountant's report. The evidence showed that between 1975 and 1984 customers of the Union Bank of Hong Kong deposited large sums of money with the Bank for offshore placement in American dollars. Those transactions were designed to produce tax benefits for the investors. The deposited funds, however, were not placed offshore, but instead were diverted to two "in house" accounts, from which much of the money was spent. Following a change in the tax laws, the offshore deposits lost

their tax advantages, and by 1983-1984 many depositers sought to withdraw their funds.

In 1984 petitioner personally approved four fictitious loans that were entered into the Bank's records and were used to raise funds that could be used to pay back some of the Bank's customers. The five loans totalled approximately $26,750,000. Petitioner later concurred in the publication of an Annual Report for the Bank, which falsely stated that the "loans" were assets of the Bank.

Based on that evidence, the district court found probable cause to believe petitioner committed the crimes alleged in the arrest warrant; in fact, the district court found that probable cause "is written all over the case." Pet. App. 37. As the court explained, "There is ample evidence of misusing the processes of the bank. There is ample evidence of putting these loans through in totally irregular fashion. There is ample evidence of misleading the bank authorities, other than the participants, as to the identity of the borrowers, the true identity of the borrowers, the intended use of the funds, the prospects of repayment." Excerpt of Record 110. Accordingly, the court executed a certificate of extraditability directed to the Secretary of State. Pet. App. 39-40. The court stayed the issuance of the certificate, however, to give petitioner an opportunity to seek review of the extradition order.

4. On September 10, 1987, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241. In that pleading, petitioner alleged that the proposed extradition violated the terms of the Treaty, because if petitioner were extradited to Hong Kong, he might be surrendered to the People's Republic of China on July 1, 1997, as a result of the reversion of Hong Kong to Chinese control. Petitioner also claimed that the extradition proceeding was flawed in several respects: he challenged the district court's acceptance of English-language affidavits from several

Chinese witnesses who were unable to speak or read English; he attacked the court's refusal to grant his discovery requests; and he protested the court's refusal to allow his attorney to argue the points raised in the habeas petition or to call a witness at the extradition hearing. In addition, petitioner complained that the offenses identified in the arrest warrant were not covered by the Treaty; he contended that he was not given sufficient notice of the pending charges prior to the extradition hearing; he challenged the sufficiency of the proof that he committed the charged offenses; and he argued that the district court erred in overruling a number of evidentiary objections he had made at the extradition hearing.

Through the district court's random assignment system, the habeas corpus case was assigned to the same district judge who had sat on the extradition matter. Petitioner moved to have the case reassigned to a different judge, but the motion was denied.

At a hearing on the habeas corpus petition, the district court amended the certificate of extraditability. Pet. App. 51-52. The amended certificate found no probable cause to support the charge that petitioner committed a crime of false accounting "with intent to cause loss to another," but affirmed the earlier finding of probable cause that petitioner had engaged in the alleged conduct "with a view to gain for himself or another," within the meaning of the applicable Hong Kong criminal statute. The following day, the district court entered an order denying petitioner's habeas corpus petition. Pet. App. 53-54.

5. The court of appeals affirmed. Pet. App. 10-22. The court found that (1) petitioner's extradition would not violate the Treaty's rule of speciality (*id.* at 13-14); (2) petitioner's alleged offenses met the requirement of dual criminality under the Treaty, and the district court's failure to make specific findings to that effect was not

critical (*id.* at 14-15); (3) the English-language affidavits were properly admitted even though the affiants could not read English, since the translators affirmed that the written affidavits represented accurate translations of the witnesses' statements (*id.* at 16); (4) the court's finding that the witnesses had not first prepared any affidavits in Chinese was not clearly erroneous (*id.* at 16-17), and thus the court acted within its discretion in not ordering disclosure of the Chinese affidavits (*id.* at 17); (5) the district court properly disposed of petitioner's objections to the competency of the evidence (*id.* at 17-18); (6) petitioner had no right to cross-examine witnesses at the extradition hearing (*id.* at 19); (7) the warrant of arrest was sufficient to apprise petitioner of the charges against him (*id.* at 20); (8) the district court did not abuse its discretion in denying petitioner's motion for discovery (*ibid.*); (9) there was probable cause to believe that petitioner committed the offenses of false accounting and publishing a false statement (*id.* at 20-21); and (10) the district court was not required to recuse itself from presiding over the habeas corpus hearing simply because it had earlier ruled on the extradition request (*id.* at 21-22).

ARGUMENT

1. Petitioner first contends (Pet. 6-11) that because the People's Republic of China will resume sovereignty over Hong Kong in 1997, it is possible that if petitioner is tried and convicted in Hong Kong, and if he is given a long sentence of incarceration, he may ultimately be subject to the jurisdiction of the People's Republic of China. Petitioner claims that in that event, he will effectively have been extradited to the People's Republic of China, in violation of the prohibition against extradition to a third nation, which is set forth in the second precondition of Article XII(1) of

the Treaty ("[a] person extradited [shall not] be extradited by [the requesting] Party to a third State"). In addition, petitioner contends that once Hong Kong is under China's jurisdiction, petitioner may be subject to additional charges, in violation of the rule of speciality set forth in the first precondition of Article XII of the Treaty ("[a] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than [the offense] * * * [for] which extradition has been granted"). The court of appeals properly rejected these contentions (Pet. App. 13-14). The 1997 resumption of sovereignty by the People's Republic of China will not effect an "extradition" of petitioner to China, as that term has been defined by this Court—*i.e.*, the "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands his surrender." *Terlinden* v. *Ames*, 184 U.S. 270, 289 (1902). If petitioner is surrendered to Hong Kong before 1997, he will be extradited to a territory (1) that is a party to the Treaty, (2) that demands his surrender, and (3) that is competent to try him and to punish him. Petitioner will not be extradited to China, even if the People's Republic of China resumes sovereignty over Hong Kong while petitioner is still in the custody of the Hong Kong government. Consequently, petitioner's extradition to Hong Kong does not violate the Treaty's ban against extradition to a third State. See *In re Extradition of Tang Yee-Chun*, 674 F. Supp. 1058, 1068-1069 (S.D.N.Y. 1987).

Nor will petitioner's extradition violate the rule of speciality embodied in the Treaty. The Treaty binds the Government of Hong Kong to prosecute petitioner only for the crimes listed in the extradition order, but it does not address the disposition of previously extradited per-

sons following a change in sovereignty. The question whether a person in petitioner's position may be prosecuted by a State resuming sovereignty (but not a party to the Treaty) is simply not answered by the Treaty; petitioner's extradition is therefore not contrary to the Treaty on that ground.

In addition to the absence of any support in the Treaty for petitioner's argument, the background of the Supplementary Extradition Treaty indicates that the Treaty was not intended to ban the extradition of a fugitive such as petitioner. As the court of appeals noted, both the United States and the United Kingdom were well aware of Hong Kong's impending return to Chinese sovereignty at the time they signed the Supplementary Extradition Treaty on June 25, 1986. Nonetheless, the parties neither restricted nor intended to restrict Hong Kong extraditions to offenses that could not lead to imprisonment for a period extending past the date of reversion. That is strong evidence that the Treaty was not intended to foreclose the extradition of persons such as petitioner, who might conceivably be subject to the jurisdiction of the People's Republic of China before the end of his Hong Kong prison sentence.

In any event, the question petitioner presents is one that, by petitioner's own admission (Pet. 4), has not been considered by any other appellate court. It is a narrow and fact-bound issue that will arise only in cases involving requests for extradition to the Crown Colony of Hong Kong during the next eight years. The issue is therefore not of sufficient general importance to warrant review by this Court.

2. Petitioner next contends (Pet. 11-14) that the district court should not have permitted the introduction of several English-language affidavits without affording petitioner the opportunity to read the original statements,

in Chinese, from which the affidavits were prepared. As both courts below concluded, this claim is meritless.

Petitioner suggests that the English-language affidavits that were admitted at the extradition hearing were each prepared by translating a Chinese-languge draft affidavit into English. The district court found to the contrary, and the record makes it clear that the process of preparing the affidavits was not as petitioner suggests.

Two of the Hong Kong law enforcement officials who were responsible for the investigation explained how the English-language affidavits were prepared. Chief Inspector Ip Lau-Chuen and case agent Lulu Yui explained that a number of witnesses made statements in Chinese that were reduced to writing at various points in the investigation. Lulu Yui was then assigned the task of preparing the affidavits that would be used to support the extradition request. In performing that task, she reviewed the witnesses' prior statements and, in some cases, reinterviewed the witnesses to obtain more information. Based on the materials in the file and her interviews with the witnesses, Lulu Yui prepared the English-language affidavits that were to be used in the extradition hearing. She then had the affidavits orally translated into Chinese and read to the witnesses for them to approve. Even with respect to witnesses whom she did not formally reinterview, Lulu Yui prepared English-language affidavits and then had the affidavits orally translated into Chinese for the witnesses prior to each witness's affirming and signing his or her affidavit. Pet. App. 95-98, 100-104. Thus, as the American prosecutor explained to the district court, Pet. App. 30, the English-language affidavits submitted to the court were not originally written in Chinese and then translated into English; the government therefore did not deprive petitioner of the opportunity to compare any Chinese-

language "draft affidavits" with their English-language translations.

Petitioner's account (Pet. 13 n.9) of how the English-language affidavits were prepared distorts the process by omitting a key step. According to petitioner, by the time the affidavits were submitted the original witness statements had been re-worked by multiple layers of police. What petitioner fails to mention is that, as both Lulu Yui and Ip Lau-Chuen explained, the witnesses approved and authorized the affidavits, as orally translated into Chinese, immediately prior to signing them. As a result, the accuracy of any translations of prior witness statements is irrelevant, since the witnesses directly affirmed the accuracy of the final affidavits, as translated orally into Chinese.

3. Petitioner next contends (Pet. 14-16) that he should have been allowed to question case agent Lulu Yui, who submitted an affidavit and was present but did not testify at the extradition hearing.

At the hearing, petitioner announced his desire to examine Lulu Yui to "go over her declaration that she submitted to the Court to go into the interview procedures, to go into her note-taking procedure, to examine those witness statements, the original Chinese witness statements, what the basis was and how they were changed" (Pet. App. 37). The district court denied that request based on its judgment that the examination of Lulu Yui would not "be productive" (*ibid.*).

As the court of appeals recognized (Pet. App. 18-19), there is no constitutional right to cross-examine witnesses at an extradition hearing. Unlike a criminal trial, an extradition hearing focuses on whether there is probable cause to believe that the fugitive committed an extraditable offense. *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Collins* v. *Loisel*, 259 U.S. 309, 316 (1922);

Charlton v. *Kelly*, 229 U.S. 447, 457-462 (1913); *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888). An extradition hearing is therefore akin to a preliminary hearing or a grand jury proceeding. The Constitution does not require an adversary hearing to establish probable cause to charge a defendant with a crime, whether that finding is made by a court in a preliminary hearing or by a grand jury. *Gerstein* v. *Pugh*, 420 U.S. 103, 121-122 (1975); *Brinegar* v. *United States*, 338 U.S. 160, 174-175 (1949). Consequently, since a fugitive at an extradition hearing has no constitutional right either to offer exculpatory evidence or to examine witnesses, *Charlton* v. *Kelly*, 229 U.S. at 462, the district court's refusal to permit the examination of Lulu Yui did not violate any fundamental right of petitioner.

Petitioner is incorrect in suggesting (Pet. 16) that this Court's decisions in *Grin* v. *Shine*, 187 U.S. 181 (1902), and *Bingham* v. *Bradley*, 241 U.S. 511 (1916), are irreconcilable on this issue and that certiorari should be granted to address the inconsistency between the two decisions. In *Grin*, the Court prefaced its discussion of the claimed errors by noting that persons subject to extradition "are entitled to the same defences as others accused of crime within our own jurisdiction" and that the Court must not sacrifice the fugitive's "legal or constitutional rights" in an extradition proceeding. 187 U.S. at 184. The Court did not further identify those rights, however. Since there is no constitutional right to confront witnesses in a preliminary hearing to determine probable cause, the refusal to grant that right in an extradition proceeding does not violate the admonition in *Grin* v. *Shine* that persons accused of criminal conduct in other countries must be treated similarly to persons accused of criminal conduct in this country. *Grin* v. *Shine* is therefore entirely consistent with *Bingham* v. *Bradley*, which recognized that in extradition proceedings the government may prove its case by affidavit

and need not present live witnesses who are subject to cross-examination.

4. Petitioner next contends (Pet. 17-21) that the district court was wrong to admit evidence at the extradition hearing simply because it satisfied the requirements of 18 U.S.C. 3190, the statute that governs the admissibility of evidence at an extradition hearing.

Petitioner made a number of unsuccessful objections to the competence of the evidence introduced at his extradition hearing. The court of appeals considered the competence of the evidence under the standards set forth in Section 3190 and the Treaty, and the court found the evidence to be properly authenticated and admissible under each. Pet. App. 17-18. The court of appeals' analysis of this issue was correct.

In considering an extradition request the court or magistrate is bound to admit evidence that complies with the statute and the Treaty. See, *e.g.*, *Collins* v. *Loisel*, 259 U.S. at 313. The weight the court gives to that evidence, however, is not subject to statutory directive. Thus, an affidavit that meets the authentication standards is admissible. If the reliability of the affidavit is otherwise open to question, however, the court may in its discretion give the affidavit little weight. *E.g.*, *In re Assarsson*, 635 F.2d 1237, 1245-1246 (7th Cir. 1980), cert. denied, 451 U.S. 938 (1981); *O'Brien* v. *Rozman*, 554 F.2d 780, 783 (6th Cir. 1977); *Argento* v. *Horn*, 241 F.2d 258, 263 (6th Cir.), cert. denied, 355 U.S. 818 (1957); *Freedman* v. *United States*, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977). The decision of the court of appeals is therefore consistent with well-settled principles, and it does not, as petitioner suggests, deny extradition courts the freedom to weigh the evidence and make an intelligent and independent judgment on the issue of probable cause.

Contrary to petitioner's contention, the decision below does not conflict with *Greci* v. *Birknes*, 527 F.2d 956 (1st Cir. 1976). In that case, the First Circuit considered both 18 U.S.C. 3190 and the particular extradition treaty involved. The fugitive in *Greci* argued that the treaty—between the United States and Italy—imposed a higher standard for authentication than the statute. The court then found that the affidavits presented to the district court in support of the extradition request were unsworn and that there was no indication the affiants were informed of the penalties for making false statements. The court therefore concluded that the affidavits did not satisfy the Italian-American treaty. See *Emami* v. *United States District Court*, 834 F.2d 1444, 1452 (9th Cir. 1987) ("[t]he First Circuit only imposed this requirement because specific language in that particular treaty mandated that result"). Unlike the court in that case, the court of appeals here concluded that the treaty at issue does not impose a higher standard for authentication than Section 3190. See Pet. App. 17. Thus, the differing outcome of the two cases is entirely attributable to the different language in the two treaties.

Equally without merit is petitioner's claim that the decision below conflicts with "the practice traditionally followed by federal courts" (Pet 18). First, the cases he cites, much like *Greci* v. *Birknes*, looked to the statute and the particular treaty involved—just as the court of appeals did in this case. In addition, *Collins* v. *Loisel*, 259 U.S. 309 (1922), on which petitioner relies (Pet. 18), itself recognized that the admissibility of evidence at an extradition hearing is determined by the statute governing authentication. 259 U.S. at 313-314. And *Zanazanian* v. *United States*, 729 F.2d 624, 627-628 (9th Cir. 1984), on which petitioner also relies, considered a hearsay claim as a challenge to the reliability of evidence that was presumably competent under the statute and the applicable

treaty. That analysis is in no way contrary to the approach followed by the same court of appeals in this case.

Petitioner is also wrong in claiming that Section 3190 violates separation of powers principles. The provision for authentication of foreign documents in Section 3190, like the rule permitting self-authentication of domestic public documents (Fed. R. Evid. 902(1)), or the rule providing for the authentication of foreign public documents (Fed. R. Evid. 902(3)), does not unconstitutionally restrict judicial authority. Neither the statute nor Rule 902 takes from the district court the ultimate issues to be determined; both simply declare that evidence is admissible when it is authenticated by a government official. The authentication provision does not also require that the evidence be credited or that it be found sufficient to meet the government's burden of proof at an extradition hearing. Those decisions are entrusted entirely to the judicial officer. Cf. *United States* v. *Southard*, 700 F.2d 1, 22 (1st Cir.), cert. denied, 464 U.S. 823 (1983).

Finally, petitioner's claim that some of the authenticated affidavits were unreliable because they contained hearsay statements or because some of the assertions lacked a foundation is a purely factual challenge that does not merit further review. Hearsay is admissible in extradition proceedings. *Collins* v. *Loisel*, 259 U.S. at 317; *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); *Emami* v. *United States District Court*, 834 F.2d at 1451; *Shapiro* v. *Ferrandina*, 478 F.2d 894, 902 (2d Cir. 1973). The district court found the affidavits to be reliable, particularly in the absence of any suggestion why the declarants would have reason to lie. Cf. *Zanazanian* v. *United States*, 729 F.2d at 627-628. Petitioner's further complaint (Pet. 20) that the affidavits included "unqualified legal conclusions" of "lay witnesses" is seemingly predicated upon the Federal Rules of Evidence, which do not apply to extradition proceed-

ings. We note also that the "lay witness" who concluded that the loan forms at issue were "misleading and false" (Pet. 20 n.16) was not a "lay witness" in the conventional sense, but was an expert accountant retained by the Government of Hong Kong to examine the bank's records.

5. Petitioner next contends (Pet. 21-23) that the district judge should have recused himself under 28 U.S.C. 455(a) from presiding over petitioner's habeas corpus proceeding, because he had previously presided over petitioner's extradition hearing.

The only other courts of appeals to address the issue have held that recusal is not required under these circumstances. *Demjanjuk* v. *Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *David* v. *Attorney General of the United States*, 699 F.2d 411, 416 (7th Cir.), cert. denied, 464 U.S. 832 (1983). No court has held that a district judge who presided over an extradition request is disqualified from hearing the ensuing habeas corpus claim. Nor does the relationship between the two proceedings suggest that such a rule should be created.

At the extradition hearing, the issue is whether there is sufficient evidence to sustain the charge under the provisions of the treaty; if there is, the judicial officer presents a certification to that effect to the Department of State. 18 U.S.C. 3184. Since there is no appeal from the judicial finding of extraditability, the fugitive's remedy is to file a petition for a writ of habeas corpus under 28 U.S.C. 2241. In that action, the district court does not revisit the issue presented in the extradition hearing. As this Court explained in *Fernandez* v. *Phillips*, 268 U.S. at 312:

> That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has already had his hearing and *habeas corpus* is available only to inquire whether the

> magistrate had jurisdiction, whether the offence charged is within the treaty, and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Because habeas corpus review is so limited and is confined to issues other than those previously decided, there is no statutory or constitutional infirmity in the reassignment of the habeas corpus proceeding to the judge who initially heard the extradition case. Contrary to the implication of petitioner's argument, the habeas corpus judge does not either decide the extradition issues anew or sit as an appellate judge to review the extradition judge's actions. Moreover, as the Sixth Circuit has recognized, habeas corpus challenges to criminal convictions are presumptively to be assigned to the judge who presided over the original criminal trial, *Demjanjuk* v. *Petrovsky*, 776 F.2d at 577. And, as the court below pointed out, "[f]ederal district judges are frequently called upon to reconsider prior rulings without recusing themselves." Pet. App. 21. For example, motions for a new trial or for a post-verdict judgment of acquittal in a criminal case are addressed to the judge who presided over the trial, and no claim can be made that the judge is disqualified because he is asked to review the correctness of his own previous orders.

Petitioner relies on the Fourth Circuit's decision in *Rice* v. *McKenzie*, 581 F.2d 1114 (1978), but that decision is not to the contrary. In that case, the court of appeals determined that a state appellate judge who rejected a state defendant's appeal and who then was appointed to be a federal judge should not have considered the same habeas claim on federal review. Because federal habeas corpus review of state criminal judgments is in some respects

like appellate review of a lower court proceeding, the court of appeals held that it was improper for the habeas corpus judge to review a judgment he had approved while sitting as a state court judge.

A rule that a judge ought not to hear the appeal from a case on which he sat below has never been extended to habeas corpus review generally or to the situation presented here, and in fact the Fourth Circuit has declined to expand its application to such situations. See *United States* v. *Parker*, 742 F.2d 127, 129 (4th Cir. 1984). Because this case is like a Section 2255 challenge to a district judge's own prior actions at trial, there is no persuasive reason to conclude that the district judge should have recused himself and refused to hear the habeas corpus claim.

6. Finally, petitioner urges (Pet. 23-26) that the distinction between "explanatory" evidence, which a fugitive may offer at an extradition hearing, and "contradictory" evidence, which he may not present at the hearing, is confusing and should be clarified by this Court. Any difficulty in applying that distinction is not presented here, however, because the evidence that petitioner proffered was clearly inadmissible under well-established principles.

The government's accounting witness found indications of fraud in the payment of loan proceeds to parties other than the borrowers, and in the "complex disbursement patterns" to Indonesian companies, who then paid the money to other accounts. Petitioner proffered the testimony of an expert to dispute that evidence. As this Court long ago stated in *Collins* v. *Loisel*, 259 U.S. at 315-316, the fugitive can explain ambiguities or doubtful elements in the government's prima facie case, but he may not present his defense case at the extradition hearing.

Petitioner's proposed "explanation" for the evidence that suggested fraud to the government's accounting witness plainly amounted to presenting a defense to the charges in the arrest warrant. And that is precisely what the rule in *Collins* v. *Loisel* makes clear the fugitive may not do. The district court therefore properly declined to hear the proffered testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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